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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 384

THE LONG ISLAND RAILROAD COMPANY,
Petitioner,

v.

JOHN R. PARKER, JR.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Respondent, John R. Parker, Jr., respectfully prays that the *writ of certiorari* to review the final judgment of the Court of Appeals for the Second Circuit entered on February 18, 1970 be denied.

Question Presented.

May a jury find a railroad liable to its employee for injuries sustained on an unlighted and dark stair leading to a passenger train platform where the jury finds that such stairway reasonably had to be used as a place of egress from the plaintiff's place of work where the railroad should reasonably have foreseen that the employee would use the train to go home?

Statement of the Case.

A. The Facts.

The plaintiff, John R. Parker, Jr., was a track maintenance foreman of the defendant, L.I.R.R. (18:24-25).* He was in the railroad's employ for twenty-two years (19:2-3) and lived in Brooklyn for nineteen of those years with his family (19:5-10).

As an assistant foreman he would take charge of the gang doing, and himself would do, track maintenance and repair (19:15-21, 80:24, 82:16). When the foreman was absent, as on the day in question and several days prior thereto, he would, in addition to the aforesaid work, also be required to prepare the time and material records for the work done (22:5-23:15). He was assistant foreman for six or seven years and had last been acting foreman a year earlier (102:18-23).

Parker would report to the railroad in Hicksville, New York (19:22-24), at the office and locker room in the divide tower (19:25-20:11) which was about 2,000 feet east of the Hicksville station (20:14). He had been working out of Hicksville for about four or five years before the accident (20:15-19). After reporting to the office, a supervisor would tell the gang where to work, which could be on any branch of the L.I.R.R. east of Hicksville (21:2-6).

On the day in question, July 24, 1964, as acting foreman, after reporting to the office and going out with a crew of about 12 men by truck, he returned to the office at about 4:40 P.M. (24:5, 84:13-85:86). He then went to the locker room (24:14-16) in the divide tower, in which

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* (Numbers in parentheses refer to pages of trial transcript where preceding colon (:); and to line number where after the colon. Suffix letter "A" refers to pages of Appendix to Petition.)

divide tower was also located the observation tower and control room and relays and electrical equipment for the running of the trains (25:1-23) in and out of the Hicksville station and between the divide tower and the Hicksville station and points east and west thereof.

The locker room had a desk and two tables, lockers for fifty to seventy-five people, and was about 30 x 30 feet in area (26:2-7). Parker made out the various reports which he was required to prepare, in that locker room (26:11-12, 26:21, 27:2, 27:3-5, 27:6-10, 27:14-15, 155:24-156:5), and with which reports he had some difficulty (28:19-29:6). After completing the work and washing up and changing his clothing (29:12-15) he went to the station building about 2,000 feet west of the divide tower to go home (29:17-25).

To get to the station from the divide tower, Parker walked on a public street—one side of the railroad track is Broadway and the other side of the track is Hicksville Road (30:10-18). At that time there were no cross streets crossing Broadway and Hicksville Road inasmuch as the railroad track and trains still ran at ground level as well as on the new overhead track. He walked directly underneath the railroad tracks crossing both streets (31:4-10, 34:5-14) which still had railroad construction going on (107).

While there was an entrance from the divide tower building on to the tracks (31:11-20), Parker was not supposed to use it (32:6).

On and prior to July 21, 1964, Parker used L.I.R.R. trains to go to and from work and had a pass (32:8-20) provided by the L.I.R.R. (33:8-9). The pass had no restrictions (114:2).

Parker was on 2-hour call for emergencies and in fact had been called on emergencies previously (33:15-21). On

the occasions when he was called, he used his pass and traveled on the railroad (33:22-25).

Parker used his pass all the time to go to and from work (34:2-4).

At the time of the accident, plaintiff earned about $135.00 per week before deductions.

At the station, Parker stubbed his toe on the middle flight of stairs leading to an upper platform as the stair was dark and he could not see the steps too well (53:8-20, 54:22-55:15, 50:17, 51:21-24, 199:22-25, 200:25-201:2, 202:3-9, 229:18-22).

The defendant's evidence indicated that some foremen did the record-keeping at night (318:24) and that the foremen were required to prepare and were responsible for preparing the records, regardless of where they were prepared (319:20-23).

Both parties concede that the L.I.R.R. did not pay the plaintiff either for preparing the reports which were required to be prepared nor for the time which the plaintiff spent in traveling between the divide tower and his home.

The Trial Court found that there was no precise formula as to the scope of employment and the Trial Court looked to cases under the New York Workmen's Compensation Law (385).

The defendant presented to the jury the issue of its negligence in having inadequately lighted steps (400, 410:2-6). Defendant argued that a person who goes to his own car to go home is not engaged in the scope of employment (427:16-21). (Cf. *Evans* v. *J.W. Mays, Inc.*, 25 A.D. 2d 597, Lv. to App. Den. 17 N.Y. 2d 423 and *GAIK* v. *National Analine*, 5 A.D. 2d 1039, Lv. to App. Den. 6 N.Y. 2d 706).

The Trial Court charged the jury on the issue of scope of employment (467:18-470:19).

According to the defendant's exception to the charge, the only test that the defendant sought to apply at the trial, was whether plaintiff was on part of railroad property which he reasonably had to use to leave his place of work (478:23-24) and whether he was required to use the train (478:6-8, 478:19-23, 481:6-12).

B. The Second Circuit's Opinion.

The opinion of the majority acknowledges that the general rule is that FELA is not applicable to injuries suffered while an employee is traveling to or from work. The opinion sets forth the great weight to be given to a jury's findings (3A) and that the issue presented in the present case was left open by the Second Circuit's case of *Young v. New York, N.H. and H.R.R.*, 74 F.2d 251, 253 (1934). The *Young* case discusses the rules concerning the duty of an employer railroad to provide a safe means of ingress and egress to an employee and that injuries occurring in such places of ingress and egress are within the scope of employment even though the employee is not physically at that time performing any work for the railroad. The Second Circuit in its opinion then goes on to discuss the facts of the present case which a jury could consider in determining whether or not the particular stair being used by the plaintiff could be found by a jury to come within the rules concerning "means of egress" (3A-4A).

REASONS FOR DENYING THE WRIT.

POINT I

THERE IS NO CONFLICT BETWEEN THE DETERMINATION BELOW AND THAT OF THE THREE OTHER COURTS OF APPEALS RELIED ON BY THE PETITIONER BECAUSE: (A) ALL COURTS RECOGNIZE THAT A RAILROAD HAS AN AFFIRMATIVE DUTY TO PROVIDE A SAFE MEANS OF EGRESS FROM EMPLOYMENT; AND (B) THE THREE OTHER COURTS OF APPEALS FOUND THAT UNDER THE FACTS AND CIRCUMSTANCES OF THEIR PARTICULAR CASES THE PLACE OF INJURY DID NOT CONSTITUTE A MEANS OF INGRESS OR EGRESS WHILE IN THE PRESENT CASE THE COURT BELOW FOUND THAT UNDER THE FACTS AND CIRCUMSTANCES OF THE PRESENT CASE AT LEAST A JURY QUESTION WAS PRESENTED.

A. All Courts relied upon by the petitioner as well as the Court below, based upon decisions of this court, find an affirmative duty on the part of a railroad to provide its employee with a safe means of egress from employment and that the employee is "employed by" a railroad with the meaning of Section 1 of the FELA while in the places of ingress or egress even though not performing one of the actual duties of employment.

The rule was succinctly set forth by this Court in the case of *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 158, wherein this Court said:

> "An employment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee be injured while passing, with the express

> or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment."

The rule was more fully expounded upon by the Second Circuit in the case of *Young* v. *New York, N.H. and H.R. Co.*, 71 F.2d 251, 252, wherein the court said:

> "Although Young had finished his run . . . that did not inevitably conclude his employment, or his occupation in interstate commerce; so much at least was definitely settled in *Erie R. Co.* v. *Winfield*, 244 U.S. 170, 172, 173, and 37 S. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918 B, 662, a decision from which a good deal of law has sprouted. But it does not settle just when he does end his employment, or when he begins it, and, generally speaking, it does not include either going to or coming away from the place where the job is carried on. Voehl v. Indemnity Ins. Co., 288 U.S. 162, 169, 53 S. Ct. 380, 77 L. Ed. 676, A.L.R. 245. One exception is when the workman is in a vehicle provided for him by his employer. Spencer Kellogg & Sons v. Hicks, 285 U.S. 502, 52 S. Ct. 450, 76 L. Ed. 903; Atlantic Coast Line R. Co. v. Williams, 284 F. 262 (C.C.A. 5). Another, when he has not yet left the premises, or has entered them on his way to work. Lamphere v. Oregon R. & N. Co., 196 F. 336 (C.C.A. 9); Easter v. Virginian R. Co., 76 W. Va. 383, 86 S.E. 37; Davis v. Chicago, etc., R. Co., 134 Minn. 49, 158 N.W. 911; Louisville, etc., R. Co. v. Walker, 162 Ky. 209, 172 S.W. 517; Ewig v. Chicago, etc., R. Co., 167 Wis. 597, 167 N.W. 442, 169 N.W. 429; Knowles v. N. Y., N. H. & H. R. Co., 223 N.Y. 513, 119 N.E. 1023; Palloco v. Lehigh

Valley R. Co., 236 N.Y. 110, 140 N.E. 212; Wabash Ry. v. Industrial Commission, 294 Ill. 419, 128 N.E. 290. This last consideration is, however, by no means a conclusive test. His employment may begin before he reaches the premises (or even after he leaves it—words in parenthesis added). Cudahy Co. v. Parramore, 263 U.S. 418, 444 S. Ct. 153, 68 L. Ed. 366, 30 A.L.R. 532; Bountiful Brick Co. v. Giles, 276 U.S. 154, 48 S. Ct. 221, 72 L. Ed. 507, 66 A.L.R. 1402; Moss Tie Co. v. Tanner, 44 F. (2d) 928 (C.C.A. 5). Conversely, if there are alternative ways of reaching the job (or leaving it—words in parenthesis added), one across the employer's property and another elsewhere, the employer's liability will depend upon whether it is 'reasonably necessary' for the workman to use the first, or whether he does so merely for his 'convenience.' Hoyer v. Central R. Co. of N. J., 255 F. 493 (C.C.A. 2); Krysiak v. Pennsylvania R. Co., 270 F. 758 (C.C.A. 3); Aldredge v. Baltimore and O. R. R. Co., 20 F. (2d) 655, 660 (C.C.A. 8); McInerney v. Buffalo and S. R. Corporation, 255 N.Y. 130, 121 N.E. 806; Tallon v. Interborough R. T. Co., 232 N.Y. 410, 134 N.E. 327, 21 A.L.R. 1218; Ames v. N. Y. Central R. Co., 178 App. Div. 324, 165 N.Y.S. 84; Hills v. Blair, 182 Mich. 20, 148 N.W. 243; Symonski v. Central Ry. of New Jersey, 102 N.J. Law, 271, 131 A. 628; Id., 103 N.J. Law 508, 135 A. 921. Cf. Dodge v. Chicago G. W. Ry. Co., 164 Iowa, 627, 146 N.W. 14. This last corrolary does not mean, as we understand it, that to hold the employer, the workman's choice must be instrumental to the work. For example, it would be untrue, except it helped a railroad to have its workmen cross its railroad tracks rather than go two miles around. The road would, for all practical purposes, be as well served if they went the long way; and yet it would be 'unreasonable' to require

them to do so. Although only their own convenience would be met, that would be enough in so extreme a case. Concealed within the phrases used, there is the unconscious solution of a conflict of interest between the two; the workmen's convenience and the employer's freedom from responsibility. Any such solution presupposes that some value has been set on each; but there can be no general principle, for the interests are various, and there is no conventional scale in which they have a recognized place."

The aforesaid general rules were all recognized by the other three Courts of Appeals which the petitioner claims are in conflict:

The case of *Sassaman* v. *Pennsylvania* R. R., 144 F.2d 950 (C.A. 3, 1944) at pages 952-953 quotes the appropriate parts of the *Winfield* case (244 U.S. 170, 173); the *Parramore* case (263 U.S. 418, 421) and the *Bountiful Brick Co.* case (276 U.S. 154, 158).

Thus too in the case of *Metropolitan Coal Co.* v. *Johnson*, 265 F.2d 173 (C.A. 1, 1959) at page 177, the *Bountiful Brick Co.* case and the *Winfield* case as well as the *Parramore* case are cited with approval.

In the case of *Quirk* v. *New York, C. and St. L. R. Co.*, 189 F.2d 97 (C.A. 7, Cert. den. 342 U.S. 871, 1951) at page 99, the Seventh Circuit's opinion quotes at length from the aforesaid *Bountiful Brick* case.

Thus in the present case the jury in accordance with the charge given by the Trial Court, and in view of the limited exception thereto, has in fact found that based upon the facts presented to them, the stairway leading to the defendant's station which was controlled from the tower in which the plaintiff had worked constituted a means of

egress from that tower to a place where the plaintiff could reasonably be expected to go in order to leave work, namely, the defendant's train.

The Second Circuit Court of Appeals in the *Young* case, 71 F.2d 251, 253, left open the question of whether Young's passage from New Haven to Midway to get his train and from Midway to New Haven after he got through, was engaged in interstate commerce. The Court said that

> "The disproportionate hardship of requiring him to go otherwise than by train may be enough; we need not, and we do not, say."

The Court below in the present case restated the question in its opinion (3A).

We respectfully submit that in view of the facts of this case the full issue was still not decided below because the present plaintiff had not yet gotten on to the train to leave from the place which was in proximity to his place of work. Thus, the relationship between the train station and the divide tower and the construction and train tracks below the overhead line which was between the divide tower and the station were such that the stairway on which the plaintiff was injured was or could be found by the jury to have been in such close proximity to the place where the plaintiff did his actual work for the defendant as to constitute a place of egress from such work. This, of course, is one of the distinguishing factors between this case and the three cases relied upon by the petitioner which will be more specifically discussed hereafter.

Thus, the petitioner's description of the Second Circuit Court's opinion below (page 7 of petition) is inaccurate because the Second Circuit did not set forth only the two tests stated by the petitioner. The two alleged tests were set forth in a non-specific way as being two of the factors among others which the jury could consider and base a finding.

B, There is no conflict between the determination of the Court below and the three other Courts of Appeals cited by petitioner.

The determination of the court below and of the Trial Court was that the plaintiff was injured "in the employment" of the defendant railroad. This is based upon a set of facts which indicate that the stairway involved constituted a place of egress from the plaintiff's employment and that the defendant should reasonably have foreseen that the plaintiff might, under all of the facts of this particular case, be required to use said stairway.

The three other Courts of Appeals, merely determined that the places where those three plaintiffs were injured did not constitute places of ingress or egress within the meaning of the case of *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 158, and all of those three Courts of Appeals cited and quoted that case.

Thus, in the *Sassaman* case (144 F.2d 950, C.A. 3rd.), the plaintiff worked in Jersey City, and lived in Newark. That plaintiff was injured on a railroad platform in Newark after getting off the train in Newark where he had arrived after leaving his work in Jersey City. Thus, on the facts of that case the place where the plaintiff was injured was not "in such proximity and relation as to be in practical effort a part of the employer's premises" where the work was being performed.

In the *Metropolitan Coal* case (265 F.2d 173, C.A. 1) some mischievous boys had put a cable belonging to a co-defendant (not the railroad) across the railroad track and when the wheel of the railroad went over the cable, it snapped into a window which broke and the plaintiff was injured by broken glass as that court said "miles away from his job" (at page 178). Further, the *Metropolitan Coal* case held that the plaintiff there "was not on a part of its

premises which it was necessary or him to use to reach his work" (at page 178) unlike the present case where the Court below determined that the jury could find that the stairway was one which was necessary for him to use in order to leave the work and was in close proximity to the place where the work was actually being performed.

In the *Quirk* case (189 F.2d 97, C.A. 7), the plaintiff therein did not get onto the railroad train until going some 12 miles from the place where the work was actually performed, by private automobile owned by a co-employee. Further, in the *Quirk* case provision was made by the railroad for Quirk to stay where he was working at the railroad's expense. Further, in the *Quirk* case, there was a rule that Quirk was to remain at the place of work. Thus, that court held that once Quirk had left the town in which the work was actually being performed in a private car, he was no longer engaged in the course of employment. Thus, the place where Quirk was injured was not in close proximity to the place where the work was actually being done and Quirk had breached a rule requiring him to stay in the town where the work was being done and Quirk did not reasonably have to be at the place where he was injured in order to go to or from his work.

As heretofore indicated, all three cases which the petitioner alleges are in conflict with the determination of the court below, in the present case all rely upon, cite, and in fact quote from this court's decision in the case of *Bountiful Brick Co.* v. *Giles*, 276 U.S. 154 and *Erie R.R. Co.* v. *Winfield*, 244 U.S. 170, wherein it was held that the place of ingress or egress need not necessarily be on the part of the employer's premises where the work was being performed, but could even be on premises owned by another which are adjacent to the work premises where it is reasonably to be expected to be used as a means of ingress or egress. Thus, the cases relied upon by the petitioner do

not involve premises on which the work was being performed nor premises adjacent thereto. In fact all three cases, as well as the other cases cited by the petitioner at pages 13-14 of the petition involved injuries sustained far from the place where the work was actually being performed and in fact was either on a train, or in a car traveling to or from work, or after getting off the train when going home from work, or before getting on the train while going to work. Thus, the Courts in those cases determined only that means of egress from or ingress to the place of employment were not involved and were too remote. How unlike the present case where the plaintiff was working in a divide tower which controlled a station 2,000 feet distant, and those 2,000 feet were part of the defendant's rail line which lay on and divided a public street which had different names on each side of the track and no cross streets, where railroad construction was going on in that street to raise the railroad from a street level line to an elevated line, where the plaintiff herein was subject to call in emergencies and lived about 40 miles away from the divide tower where he was required to report to work and was thus required to travel a distance of 80 miles per day and his take-home pay was a mere $128.00 a week and it was thus not feasible for the plaintiff to continue his employment if he were not furnished the free railroad travel, and the plaintiff in the present case had not yet boarded a train to go home.

The court below in its opinion states that in *Young* v. *New York, N. H. & H. R. R.* (74 F.2d 251, 253, C.A. 2, 1934) it had left open the question of whether a train trip to the employee's home would be considered in the course of employment if it was unreasonable to expect him to travel by other means. The three Courts of Appeals which the petitioner claims are in conflict reach only a portion of the question left open in the *Young* case: (a) While on the train going to or from work (*Metropolitan Coal Co.* v.

Johnson, supra; Quirk v. *New York, C. and St. L. R. Co., supra; Vincent* v. *Harvey Well Service*, 309 F.S. 961 (petition, p. 13); (b) After getting off the train on the way home (not while going from place of work to the train) (*Sassman* v. *Penn. R.R., supra; Warner* v. *N. Y. C. R. Co.*, A. D. 2d , N. Y. L. J., June 17, 1970, p. 1, petition p. 13); (c) While going to a train on the way to work (but not after getting off the train to the place of work) (*Symanski* v. *Central R. R. of N. J.*, 103 N. J. L. 508, 135 A. 921 affirming 102 N. J. L. 271, 131 A. 628 (petition p. 14).

Thus, all of the cases cited by the petitioner were held by the court not to involve places of ingress or egress because they were too far from the place of work within the meaning of *Bountiful Brick* v. *Giles*, and no necessity was shown. Thus, the only thing decided by the Court below was that if it was reasonable for the defendant to expect that this plaintiff would travel home by its railroad, on its unrestricted pass, then the railroad must provide a safe means for getting to that train. The Court below discusses the factors which it deems to constitute some evidence from which a jury could infer whether or not it was reasonable for the defendant to expect a plaintiff to travel by train. In view of the citation by the Court below of the *Young* case which discusses the law concerning ingress and egress as being within the scope of employment, we view the decision of the Court below as impliedly assuming that the place of the accident was a place of egress if it were found that train travel was reasonably to be expected. Petitioner, however, seems to construe the decision of the Court below to mean that all travel to and from work, if reasonably to be expected, are within FELA, but we respectfully submit that the facts in this case do not go so far, unlike the cases relied upon by the petitioner which go much further than the present case.

Under the circumstances, and in view of the limited facts in the present case which were not involved in the cases cited by the petitioner, we respectfully submit to this Court that there is no conflict between the holding of the Court below and that of any other Court of Appeals as the other Courts of Appeals have not yet ruled on the fact pattern and issues similar to that here presented by the exceptions to the charge and the facts of this case. This is especially true in view of the fact that the other Courts of Appeals had no facts before them from which a jury could find that it was unreasonable to expect the injured railroad employee to be traveling by any other means than that which he was in fact using, unlike the present case where a jury found it to be unreasonable to expect the plaintiff to travel by any means other than that by which he had yet to commence traveling.

POINT II

SOME OF THE STATEMENTS MADE IN THE PETITION MISCONSTRUE THE ACTUAL FACTS.

The petition on page 5 states that "Mr. Parker traversed approximately 8 city blocks between the tower and the Hicksville passenger station by walking on the public street known as Broadway and Hicksville Road." In the first place it is to be noted that Hicksville Road and Broadway constitute a single street down the middle of which runs the defendant's railroad track and that on one side of the track it is known as Hicksville Road and on the other side of the track it is known as Broadway. Further, there were in fact no 8 city blocks between the tower and Hicksville station because there were in fact no cross streets as the railroad track prevented any cross streets from existing between those two places, and further there was construction work going on between the tower and the station at street level so as to create a new track which

would be elevated and no longer on the city street once the construction had been completed (30:10-18).

The petitioner on page 3 goes on to state that "there was no evidence in the record to indicate that the LIRR was aware of Mr. Parker's customary method of traveling to and from work." This is clearly not the case (32:8-20, 33:8-9, 33:15-21, 33:22-25, 34:2-4). In view of the length of time which Parker had been using the pass which is in evidence, the defendant and its agents are certainly chargeable with knowledge as to the means used by Mr. Parker to travel on the railroad.

The petition at page 5 further alleges that "there was no evidence in the record to indicate that the LIRR had authorized Mr. Parker to use or were even aware that he had to use a pass for that purpose" (going to and from work). In view of the fact that the pass had no restrictions (114:2) and in view of the number of times that Parker had in fact used the pass for the purpose of going to and from work, a distance of about 40 miles in each direction, it is respectfully submitted that a jury could certainly infer that the railroad had authorized such use and had knowledge, actual or implied, of such use.

At the bottom of page 5 and the top of page 6 of the petition, it is stated that the plaintiff's "hourly wages began when he reported to the tower in the morning and ended when he reported back to the tower in the evening." As was pointed out by the Court below this argument was "weakened by the fact that Parker was not compensated either for the time making out the reports in the tower, which, if performed, was concededly in the course of employment" (4A, 319:20-23).

On page 6 of the petition it is claimed that "the cause of the fall was alleged to be a lack of light on the stairs. The LIRR did not dispute that at the time of Mr. Parker's fall the electric lights, which were turned on automatically when a photo-electric cell was activated by a lack of natural light, had not yet come on. On the other hand, Mr. Parker did not dispute that those lights did come on a short time after his fall." What the petitioner fails to advise this Court was that there was a concrete covering above the platform which covering was more than 10 feet wide (49:12-21) which would block light from coming down from the top stairway into the middle stairway; that there were no lights on the stairs (50:17) or in the immediate vicinity of the stairs (51:21-24); that the defendant's own witness Dixon testified that from the top of the first landing, he could not see each step in the middle flight of stairs (199:22-25); that even when Dixon was halfway up the second flight, he could only make out the edge of each step and not the full step (200:25-201:2); and that when Dixon arrived at the scene of the accident after its occurrence, the station lights were not yet on (202:3-9); that direct rays of the sun do not reach lower sections covered by the roof and supported by pillars (229:18-22); and that the defendant's employee Crashenfels testified that the photo-electric cell that turned the lights on and off was opposite the station building, some 15 feet away from it (275:2-10); and that absent light from above the stair, there would be little, if any, light on the stair (286:10-20).

On page 7 of the petition it is noted that no active Circuit Judge requested that a vote be taken on the railroad's suggestion that a hearing be held *en banc*. It is noted, of course, that even the dissenting Judge did not make such a request.

Lastly, it is to be noted that the New York State cases now construe the places of ingress and egress more liberally

than the older New York cases cited by the dissenting opinion. See *Gaik v. National Mahline*, 5 A.D. 2d 1039, 173 N.Y.S. 2d 409, leave to appeal denied 6 N.Y. 2d 706; *Evans v. J. W. Mays, Inc.*, 25 A.D. 2d 597, leave to appeal denied, 17 N.Y. 2d 423 where the accident occurred on a municipal parking lot; *cf. Rozelle v. Robertson*, 29 A.D. 2d 589, 590; *Fay v. DeCamp*, 257 N.Y. 407, 411.

CONCLUSION

THE DETERMINATION BY THE COURT BELOW THAT A JURY QUESTION WAS RAISED AS TO WHETHER THE STAIR INVOLVED WAS A PLACE OF EGRESS SO AS TO SUSTAIN THE DETERMINATION THAT THE PLAINTIFF WAS IN THE COURSE OF EMPLOYMENT AT THE TIME OF THE ACCIDENT IS NOT IN CONFLICT WITH THAT OF ANY OTHER COURT OF APPEALS AND THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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